Supreme Court, U.S.
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88-1527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

YUN KIL MOON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether or not a Court of Appeals has jurisdiction, pursuant to Section 106(a) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1105a(a)], to review an order of the Board of Immigration Appeals, denying a request for a stay of deportation pending the Board's adjudication of an appeal from a denial of a motion to re-open deportation proceedings pursuant to Immigration and Nationality Act Section 242 (b) [8 U.S.C. 1252(b)]?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

YUN KIL MOON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit dismissing petitioner's petition for review.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 19, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Immigration and Nationality Act of 1952, as amended:

Section 106, 8 U.S.C. 1105a

(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 USC 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act [8 USC Section 1252(b)] or comparable provisions of any prior Act, except that –

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition of review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit; ...

(B) ...

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceedings, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceedings, unless the petition presents grounds which the court finds could not have been presented in such prior proceedings, or the court finds that the remedy provided by such prior proceedings was inadequate or ineffective to test the validity of the order.

RELATED REGULATIONS

8 C.F.R. 3.4 **Withdrawal of appeal.**

In any case in which an appeal has been taken, the party taking appeal may file a written withdrawal thereof with the office with whom the notice of appeal was filed. If the appeal has been taken by a trial attorney, such written withdrawal may be made by the district director or regional

commissioner having administrative jurisdiction over the case or by the General Counsel. If the record in the case has not been forwarded to the Board on appeal in accordance with Section 3.5 the decision made in the case shall be final to the same extent as though no appeal had been taken. If the record has been forwarded on appeal, the withdrawal of the appeal shall be forwarded to the Board and, if no decision in the case has been made on the appeal, the record shall be returned, and the initial decision shall be final to the same extent as though no appeal had been taken. If a decision on the appeal shall have been made by the Board in the case, further action shall be taken in accordance therewith. Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal but prior to a decision thereon shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

8 C.F.R. Section 3.6 **Stay of execution of decision.**

(a) Except as provided in Section 242.2 of this chapter and paragraph (b) of this section, the decision in any proceedings under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such

decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of an Immigration Judge under Section 242.22 of this chapter denying a stay deportation, except when a stay pending appeal has been granted by the Immigration Judge. The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge.

(c) Saving Clause. Notwithstanding the provisions of paragraph (b) of this section, any stay of execution of decision existing under paragraph (a) of this section when paragraph (b) of this section becomes effective shall continue until the Boa d has disposed of the appeal.

8 C.F.R. Section 242.22 **Reopening or reconsideration.**

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of Section 103.5 of this chapter. The immigration judge may upon his/her own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he/she had made a decision, unless jurisdiction in the case is vested in the Board of Immigration Appeals under Part 3 of this chapter. An order by the immigration judge granting a motion

to reopen may be made on Form I-328. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under Section 242.17 be granted if respondent's right to make such application were fully explained to him/her by the immigration judge and he/she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of the motion under this section with an immigration judge shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the immigration judge who has jurisdiction over the motion specifically grants a stay of deportation. The immigration judge may stay deportation pending his/her determination of the motion and also pending the taking and disposition of an appeal from such determination.

STATEMENT

The petitioner is a native and citizen of Korea who was admitted to the United States in 1982 as a visitor.

At a deportation proceeding conducted under Section 242(b) of the Immigration and Nationality Act of 1951, as amended [8 USC 1252(b)], held in September 1984, the petitioner was found deportable as an overstayed alien and was granted the opportunity to depart the United States voluntarily by January 1, 1985. Pursuant to Immigration and Nationality Act Section 244(e) [8 USC 1254(e)]. An alternate order of deportation was to come into effect should the petitioner not leave within the time allotted. No appeal of the matter was filed.

Subsequently, the petitioner married a United States citizen who filed an immigrant visa petition on his behalf. This petition was approved in September 1986 and on the strength of this approval, the petitioner moved to reopen his deportation proceedings before the

immigration judge in order to apply for the adjustment of his status to lawful permanent resident pursuant to Immigration and Nationality Act Section 245 [8 USC 1255]. This motion was denied about one year later on August 27, 1987.

Thereafter, the petitioner sought and obtained from the respondent Immigration and Naturalization Service an extension of his "voluntary departure" time to February of 1988.

A new motion to reopen deportation proceedings pursuant to 8 CFR 242.22 was made to the immigration judge on May 10, 1988. The petitioner sought to apply for adjustment of status under Immigration and Nationality Act Section 245 and for a waiver of a ground of exclusion under Immigration and Nationality Act Section 212(a) [8 USC 1182(a)] alleged to exist by the Immigration and Naturalization Service

that would bar the petitioner's immigration to the United States. Simultaneously, a stay of deportation was sought from the immigration judge pursuant to 8 CFR 242.22. The stay request was necessary because the Immigration and Naturalization Service had called for the petitioner to surrender himself for deportation.

The motion to reopen was denied on June 27, 1988. On July 6, 1988, an appeal was taken to the Board of Immigration Appeals pursuant to 8 CFR 242.22. A request for a stay of deportation pending a determination of the appeal was then sought from the immigration judge. On July 8, 1988, the request was denied. Thereafter, a request for a stay of deportation was sought from the Board pursuant to 8 CFR 3.6(b). Copies of the notice of appeal and of the motion to

reopen were sent by overnight mail to the Board on July 11, 1988.

At that time, the petitioner was under an Immigration and Naturalization Service order to surrender for deportation on July 15, 1988.

On July 13, 1988, the B.I.A. denied the request for a stay of deportation by a memorandum in which the Board indicate that there is little likelihood that the underlying appeal will be sustained.

On July 14, 1988, a petition for review of the Board's denial of a stay of deportation was filed with the Sixth Circuit Court of Appeals pursuant to Immigration and Nationality Act Section 106(a) [8 USC 1105a(a)].

On December 19, 1988, the Court of Appeals dismissed the petition for review for lack of appellate jurisdiction upon respondent's motion. The Court of Appeals

held that the denial of a motion to stay deportation pending a ruling on a motion to reopen is an interim order not reviewable by an appellate court under Immigration and Nationality Act Section 106(a).

On December 22, 1988, petitioner's counsel inquired by letter to the Board about the status of the petitioner's appeal. No response was received by counsel. On or about January 6, 1989, counsel telephoned the Board and was told that the appeal was still pending and no decision was expected for several months. On March 7, 1989 a telephonic inquiry was again made, yielding the same answer. As of the filing of this petition with this Court, the appeal is still pending with the Board.

Reason for Granting the Writ

The issue presented is an important question of federal law which affects many aliens and arises repeatedly. Although the issue has been decided by a number of Courts of Appeals, it has not previously been considered by this court. It is respectfully submitted that this question should be settled by the Supreme Court.

I.

Section 106(a) of the Immigration and Nationality Act conveys upon Courts of Appeals the exclusive jurisdiction to review all final orders of deportation made against aliens pursuant to administrative proceedings under the Immigration and Nationality Act Section 242b [8 USC 1252(b)].

Further, Immigration and Nationality Act Section 106(a) has been held to afford Courts of Appeals appellate jurisdiction

over discretionary relief sought within a section 242(b) proceeding such as suspension of deportation, voluntary departure, and a waiver of grounds of exclusion pursuant to Immigration and Nationality Act Section 212(c) [8 USC 1182(c)]. Foti v. Immigration Service, 375 U.S. 206, 11 L. Ed. 2d, 281, 84 S. Ct. 306 (1963), Cheng Fan Kwok v. INS, 392 U.S. 217, 20 L. Ed. 2d 1037, 80 S. Ct. 1970 (1968). Courts of Appeals likewise have been found to have exclusive jurisdiction to review Board of Immigration Appeals denials of motions to reopen deportation proceedings. Such a procedure has been held to be conducted pursuant to a section 242(b) deportation proceeding, although clearly occurring after an order of deportation has become final for purposes of effectuating

deportation. Giova v. Rosenberg, 379 U.S. 18, 13L, Ed., 2d. 90, 85 S. Ct. 156.

It is submitted that a stay of deportation sought from the Board of Immigration Appeals in conjunction with a motion to reopen deportation proceedings or an appeal of the denial of such a motion is made pursuant to, during, and incident to a section 242(b) proceeding.

Further, the Board's denial of such a stay is tantamount to a final order of deportation and therefore may only be reviewed by a Court of Appeals pursuant to Immigration and Nationality Act Section 106(a)

In the case of Foti v. Immigration Service, 375 U.S. 217, 11 L. Ed. 2d., 281, 84 S. Ct. 306 (1963), the Court stated that:

> it seems rather clear that all determinations made during and incident to the administrative proceedings conducted by a special

> inquiry officer, and reviewable together by the Board of Immigration Appeals... are likewise included within the ambit of the Courts of Appeal under Section 106(a).

Here, the petitioner sought a stay in conjunction with an appeal taken to the Board of Immigration Appeals pursuant to 8 CFR 3.6(b). The Board is the sole administrative body that has power to review section 242(b) proceedings. At the time that the appeal was filed and the stay sought, a final order of deportation was in effect, pursuant to 8 CFR 3.7. The petitioner had not appealed the alternate order of deportation entered against him in 1984 at the deportation proceeding.

Neither a motion to reopen Section 242(b) proceedings nor an appeal of the denial of such a motion affect the validity of an order of deportation. 8 CFR 242.22 and 8 CFR 3.6(b). Therefore, notwithstanding the pendency of the

petitioner's appeal to the Board of Immigration Appeals, he remains subject to immediate deportation by the Immigration and Naturalization Service.

It is to elevate form over substance to consider that the Board's denial of a stay of deportation to the petitioner is not tantamount, indeed identical, to a final order of deportation. Certainly this order was entered in the course of administrative proceedings conducted under Section 242(b). While the Board is not the source of the deportation order against the petitioner, the Board would have to act affirmatively to prevent deportation by granting a stay while it adjudicates the petitioner's appeal. It is submitted that this is a distinction of no consequence because the effect of not granting the petitioner a stay is the same as directly ordering his deportation,

something anticipated by the regulations and well understood by the Board. To deny the stay is to allow deportation to ensue.

Further, the Board indicated that they have denied the stay because, after reviewing petitioner's appeal and the underlying motion, they find little likelihood that the appeal will be sustained. The denial was therefore made with the intention that the petitioner be deported and therefore constitutes a final order of deportation.

II

Amongst the decisions of the Courts of Appeals related to the question presented, only the case of Reyes v. Immigration and Naturalization Service, 571 F. 2d. 505 (9th Cir. 1978) attempted any analysis of the issue. Other Courts of Appeals decisions on this question have

essentially followed the Ninth Circuit's opinion without further discussion.

Reyes involved a petition for review brought under Immigration and Nationality Act Section 106(a) of the Board's denial of a stay of deportation while a motion to reopen a Section 242(b) proceeding was still pending before the Board.

The Ninth Circuit held that the stay denied was not a "final order of deportation" under Immigration and Nationality Act Section 106(a) but rather a discretionary denial of interim relief. Id. at 506.

The Ninth Circuit also held that the denial of a stay is not the functional equivalent of final order of deportation because it does not terminate a proceeding in which deportability is determined. Id. at 506-507.

> "There will be no order which terminates the proceedings until the

> motion to reopen is denied or the proceedings are reopened and concluded." Id. at 507.

Both holdings of the Ninth Circuit ignore the context in which a stay of deportation is sought from the Board of Immigration Appeals. The stay is not sought in a procedural vacuum. A stay is necessary because the outstanding order of deportation remains in effect notwithstanding the pendency of a motion to reopen. The order of deportation is certainly final enough for the Immigration and Naturalization Service to deport the alien even though a motion or appeal is pending with the Board.

The result of the denial of the stay is quite final: deportation ensues. Also, deportation results in a withdrawal of any pending motion to reopen or appeal concerning the Section 242(b) proceeding under 8 CFR 3.2 and 8 CFR 3.4. The

subject matter of the motion or appeal therefore can never be reviewed once the alien is deported. Further, since the deported alien will not have exhausted his or her administrative remedies, no judicial review can be had, pursuant to Immigration and Nationality Act Section 106(a), of the deportation proceeding. This is quite apart from the fact that the alien's departure from the United States alone would also deprive a Court of Appeals of jurisdiction under that statute. These concerns were noted sympathetically by the Third Circuit Court of Appeals in Dill v. INS, 773 F. 2d 25, 30 (3rd Cir. 1985) and Reid v. INS, 776 F. 2d 113, 116 (3rd Cir. 1985).

The Ninth Circuit in Reyes, op. cit., also objected to treating the denial of a stay as a final order of deportation because the Court of Appeals believed that

this would allow petitioners to indefinitely postpone deportation through the dilatory tactic of filing successive frivolous petitions. This would be contrary to the express congressional intent in passing Section 106(a).

The problem of abusive litigation by aliens who would seek delay of deportation through dilatory tactics was addressed by the Congress in 1961 when it added Section 106 to the Immigration and Nationality Act. The Congress sought to avoid the multiplicity of litigation that enabled some aliens to prolong their deportations through the assertion of meritless, or even frivolous, claims. Foti v. Immigration Service, 365 U.S. 217, 224-227, 11 L. Ed. 2d 281, 287-289; 84 S. Ct. 306 (1963). In Foti, the Supreme Court noted that the elimination of suits in District Court and the restriction of

review to the Court of Appeals, subject only to certiorari jurisdiction of the Supreme Court, was the key feature of the plan. Id. at 374, 11L. Ed. 2d at 288.

The congressional intent to prevent multiplicitous litigation would not be subverted by holding that the denial of a stay of deportation to the petitioner by the Board of Immigration Appeals is now reviewable by a Court of Appeals under Immigration and Nationality Act Section 106(a). Such review appears to be the only course that may be followed now, for the Board's denial of the stay is certainly not reviewable in any other forum.

Curiously, the respondent herein, in its motion to dismiss the petition for review, opined that, alternatively, the petitioner should seek a stay of deportation from the Immigration and

Naturalization Service District Director during the pendency of his appeal to the Board, and that, if denied, he could commence a District Court action to review that denial. Apart from the fact that the District Director has consistently opposed a stay of petitioner's deportation, making such a request a futile act, the result of this procedure would be the commencement of a separate action which of necessity would entail litigation of the very issues that had been brought before the Court of Appeals on the petition for review. This would subvert the congressional intent manifested in the passage of Immigration and Nationality Act Section 106.

Further, the petitioner is following the congressionally mandated procedure for review of his deportation proceeding. Any petition brought by an alien is subject to summary dismissal, upon motion, if it be

deemed frivolous and submitted for purposes of delay. The policy of preventing such cases in the first place is not obviated here, and should not be used as the basis for finding that the Court of Appeals has no jurisdiction.

III.

The petitioner's circumstances are distinct from those dealt with in Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 20 L. Ed. 2d 1037, 80 S. Ct. 1970 (1968). In Kwok, this Court held that the denial by an Immigration and Naturalization Service District Director of a stay of deportation does not constitute a final order of deportation nor an order made pursuant to a Section 242(b) proceeding within the meaning of Immigration and Nationality Act Section 106(a). This Court held that:

> the judicial review provisions of Section 106(a) embrace only those

> determinations made during a proceeding conducted under Section 242(b), including those determinations made incident to a motion to reopen such proceedings.

To reiterate, the case at bar involves the denial by the Board of Immigration Appeals of an application for a stay of deportation pending the Board's determination of the appeal of a motion to reopen Section 242(b) proceedings. This precise case has never been decided by this Court. It is again submitted that the question of whether or not the Board's denial of a stay of deportation in the circumstances presented constitutes an order reviewable by a Court of Appeals under Section 106(b) ought to be decided by this Court.

It is noted that Justice White, in a dissenting opinion in Kwok at 392, 20L. Ed. 2d at 1046, stated that he understood the majority opinion to mean that if a special inquiry officer had possessed

jurisdiction to issue a stay order pending Kwok's efforts to obtain discretionary relief from the District Director, then his denial of the stay, like a refusal to reopen, would be appealable to the Court of Appeals. This is of course precisely the position of the herein petitioner, Mr. Moon.

CONCLUSION

WHEREFORE, in consideration of the importance of the question of federal law presented, a question that affects many aliens and arises repeatedly, it is respectfully prayed that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Decision of the Board of Immigration Appeals

U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: 26 645 216 - New York

Date: July 13, 1988

In re: YUN KIL MOON

IN DEPORTATION PROCEEDINGS

APPEAL

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ON BEHALF OF SERVICE:

David M. Dixon
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APPLICATON:

Request for a stay of deportation

Counsel for the respondent has requested a stay of deportation pending the Board's consideration of an appeal

from a denial of a motion to reopen. After consideration of all information submitted, the Board has concluded that there is little likelihood that the appeal, when received, will be sustained. Accordingly, the request will be denied.

ORDER: The request for a stay of deportation is denied.

David L. Milhollan
Chairman

ORDER

No. 88-3620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

YUN KIL MOON,	)
Petitioner,	)
v.	)
IMMIGRATION AND NATURALIZATION SERVICE,	)
Respondent.	)

BEFORE: MARTIN and JONES, Circuit Judges, FEIKENS, Senior District Judge*

Petitioner seeks review under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a, of an order of the Board of Immigration Appeals affirming the denial of a stay of deportation pending adjudication of the petitioner's motion to reopen deportation proceedings.

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* The Honorable John Feikens, U.S. Senior District Judge for the Eastern District of Michigan, sitting by designation.

Petitioner's motion to reopen is presently pending before the Board. The Immigration and Naturalization Service now moves to dismiss this petition for lack of appellate jurisdiction. The petitioner opposes the motion.

Under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a, the courts of appeals have exclusive jurisdiction to review final orders of deportation entered under deportation proceedings pursuant to 8 U.S.C. § 1252. The denial of a motion to stay deportation pending a ruling on a motion to reopen is an interim order not reviewable by an appellate court under 8 U.S.C. § 1105(a). Reid v. INS, 766 F.2d 113, 115 (3rd Cir. 1985); Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984); Diaz-Salazar v. INS, 700 F.2d 1156, 1159 (7th Cir.), cert. denied, 462 U.S. 1132

(1983);Kemper v. INS, 705 F.2d 1150 (9th Cir. 1983); see also Cheng Fan Kwok v. INS, 392 U.S. 206, 216 (1968); Andres v. INS, 460 F.2d 287 (6th Cir. 1972). Accordingly,

It is **ORDERED** that the motion is granted and this petition for review is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk
Clerk

Supreme Court, U.S.
FILED
MAY 1989
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CLERK

No. 88-1527

In the Supreme Court of the United States

OCTOBER TERM, 1988

YUN KIL MOON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction, under 8 U.S.C. 1105a, to review the Board of Immigration Appeals' denial of petitioner's request for a stay of deportation pending the Board's consideration of his motion to reopen his deportation proceedings.

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In the Supreme Court of the United States

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is unpublished, but the decision is noted at 865 F.2d 262 (Table). The decision of the Board of Immigration Appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1988. The petition for a writ of certiorari was filed on March 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 19, 1982, petitioner entered the United States as a temporary visitor. He remained beyond the date authorized by the Immigration and Naturalization Service

(INS) without permission. On September 1, 1983, petitioner was served with an order to show cause why he should not be deported as an overstay. In September 1984, at his deportation hearing, petitioner conceded deportability and was granted the privilege of voluntary departure in lieu of deportation on or before January 1, 1985. App., *infra*, 1a. Petitioner failed to depart, however, within the authorized voluntary departure period.

On November 22, 1984, petitioner married a naturalized United States citizen. Petitioner's wife filed a visa petition on petitioner's behalf, which the INS subsequently approved. Thereafter, petitioner filed a motion to reopen his deportation proceedings with the immigration judge (IJ), in order to adjust his status to that of a lawful permanent resident under 8 U.S.C. 1255. On August 28, 1987, the IJ denied the motion. The IJ found that petitioner's marriage was fraudulent and had been annulled and that petitioner had attempted at least twice earlier to procure a visa by fraud. App., *infra*, 3a-5a.

On April 19, 1988, the INS notified petitioner to appear for deportation in Oakdale, Louisiana, on May 3, 1988. In the interim, petitioner requested an extension of his reporting date for deportation, stating that he was unable to obtain a passport by May 3, 1988. The INS granted petitioner's request. On May 10, 1988, petitioner filed a second motion to reopen, again for the purpose of applying for an adjustment of status. On June 27, 1988, the IJ denied this motion on the basis that circumstances had not changed materially since the earlier denial. App., *infra*, 6a.

On July 8, 1988, the IJ denied petitioner's request to stay his deportation pending an appeal to the Board of Immigration Appeals of the denial of the motion to reopen. Petitioner then renewed before the Board his request for a stay of deportation. On July 13, 1988, the Board denied

petitioner's request for a stay pending consideration of his administrative appeal, concluding from the record that "there is little likelihood that the appeal, when received, will be sustained." Pet. App. 2a.

On July 14, 1988, petitioner filed a petition for review in the United States Court of Appeals for the Sixth Circuit, seeking review of the Board's denial of a stay of deportation. On December 19, 1988, the court dismissed the petition for review for lack of jurisdiction. Pet. App. 3a-5a. The court explained that "[t]he denial of a motion to stay deportation pending a ruling on a motion to reopen is an interim order not reviewable by an appellate court under 8 U.S.C. § 1105a." Pet. App. 4a. As of the date of this filing, petitioner's motion to reopen is still pending before the Board.

ARGUMENT

Despite the consistent rejection by the courts of appeals of petitioner's contention, and the absence of support for his position in the text of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, petitioner insists that he is entitled to seek direct review in the court of appeals of the Board's denial of a stay of deportation pending its ruling on his motion to reopen. Petitioner's contention is without merit and does not warrant further review.

Petitioner argues (Pet. 12-14) that 8 U.S.C. 1105a(a) (Section 106(a) of the Immigration and Nationality Act) provides the courts of appeals with jurisdiction to review the denial of his request for a stay of deportation. Section 1105a states that the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which vests exclusive jurisdiction in the courts of appeals to review certain administrative orders, "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation * * *

against aliens * * * pursuant to administrative proceedings under [section 242(b)] of this [Act]."* Section 1105a also provides that pending the determination of an alien's petition for review of such a final order of deportation by a court of appeals, the alien's deportation shall automatically be stayed. 8 U.S.C. 1105a(a)(3). Congress provided for review of a "final order of deportation" in the courts of appeals in order "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts." *Foti* v. *INS*, 375 U.S. 217, 226 (1963); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 214 (1968).

In *Cheng Fan Kwok* v. *INS*, this Court held that the denial of a stay of deportation by a district director of the INS was not reviewable in the courts of appeals under Section 1105a. 392 U.S. at 212. Concluding that a district director's denial of a stay of deportation "neither is a final order of deportation, nor is it * * * 'made during the same proceedings' in which a final order of deportation has been issued", the Court held that it was not covered under Section 1105a. 392 U.S. at 213 n.11. The Court stressed that Section 1105a(a) does not "encompass 'all orders' entered pursuant to § 242(b) proceedings; it is limited to 'final orders of deportation.' " 392 U.S. at 213-214 n.11. Just as the district director's denial of a stay in *Cheng Fan Kwok* was not a "final order of deportation," the Board's discretionary denial of a stay pending its ruling on a motion to reopen is also not a "final order of deportation" within the scope of Section 1105a.

No decision of this Court supports the construction of Section 1105a that petitioner urges. *Foti* v. *INS*, *supra*,

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* Section 242(b) of the act, 8 U.S.C. 1252(b), establishes administrative hearing procedures for the entry of a deportation order. See generally *Landon* v. *Plasencia*, 459 U.S. 21, 26-27 (1982).

holds that a "final order of deportation" under Section 1105a includes the INS's "denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding." 375 U.S. at 224. On this basis, the Court in *Foti* decided that the denial of suspension of deportation during an alien's deportation proceedings was reviewable under Section 1105a. The Board's denial of a stay of deportation, however, pending its ruling on a motion to reopen does not "effectively terminate the proceeding," because the motion to reopen is still pending. If that motion is denied by the Board, the Board's action will then be reviewable under Section 1105a. *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam); *Cheng Fan Kwok*, 392 U.S. at 211.

The courts of appeals have uniformly rejected the argument that petitioner advances in this Court. In an unbroken line of cases stemming from *Reyes* v. *INS*, 571 F.2d 505 (9th Cir. 1978), the courts have held that a denial of a stay of deportation while a motion to reopen is pending is not reviewable under Section 1105a. See *Gando-Coello* v. *INS*, 857 F.2d 25, 26 (1st Cir. 1988) (noting that the other circuits "speak with one voice" on this question); *Reynolds* v. *United States Department of Justice INS*, 846 F.2d 1288, 1290 (11th Cir. 1988); *Reid* v. *INS*, 766 F.2d 113, 115 (3d Cir. 1985); *Ramirez-Osorio* v. *INS*, 745 F.2d 937 (5th Cir. 1984) (denial of petitioner's stay request by Board is not an appealable order); *Bonilla* v. *INS*, 711 F.2d 43 (5th Cir. 1983); *Kemper* v. *INS*, 705 F.2d 1150 (9th Cir. 1983) (denial of motion to stay deportation proceedings is interim order and not reviewable under Section 1105a); *Diaz-Salazar* v. *INS*, 700 F.2d 1156, 1159 (7th Cir.) (denial of a stay of deportation by the Board is not a reviewable final order), cert. denied, 462 U.S. 1132 (1983).

Not only is petitioner's argument inconsistent with the plain language of Section 1105a and the weight of authority, it is also squarely at odds with Congress's goal in enacting that provision: "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals" (*Foti*, 375 U.S. at 226). Indeed, petitioner's construction of Section 1105a would produce precisely the opposite result. Instead of expediting deportations, petitioner's approach would only encourage dilatory tactics by aliens seeking delay. This case well illustrates the problem.

Petitioner is already under a final order of deportation, from which he did not seek judicial review. As a matter of discretion, the INS allows aliens to submit motions to reopen in order to take account of exceptional cases in which relief from an order of deportation is warranted. See *INS* v. *Abudu*, 108 S.Ct. 904, 907-913 (1988). But the filing of a motion to reopen does not stay the alien's deportation, unless a stay is specifically granted in the discretion of the Board or an authorized INS officer. 8 C.F.R. 3.8(a). Petitioner's approach would invert that scheme by providing him with an *automatic* stay of deportation while the court considers his petition for review of the discretionary denial of a stay. If such an automatic stay were available merely by filing with the Board a motion to reopen together with a request for a stay of deportation, and then by petitioning the court for review of the Board's denial of such a stay, it is apparent that many frivolous motions to reopen would be submitted solely to postpone the alien's time of leaving this country. Cf. *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985) ("One illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible.").

Petitioner's view of Section 1105a, therefore, harbors a powerful potential for protracting an alien's stay in this

country beyond the date of a lawful order of deportation. In *Bonilla* v. *INS*, 711 F.2d at 44, the court described the abuses that petitioner's view of Section 1105a would invite:

> An alien files a motion to reopen his order of deportation and at the same time requests a stay. When the stay is denied he petitions for review of the denial of stay in the court of appeals, thereby obtaining an automatic stay. As soon as the motion to reopen is denied, the alien files another motion to reopen and another request for a stay, and then petitions for review of the denial of this second request for a stay, thereby obtaining an automatic stay once again. As long as a petition for review is pending in this court, a series of automatic stays will bar deportation of the alien, regardless of the merits of his case. We do not here, and caution that we will not in the future, tolerate this sort of sharp dealing.

See also *Gando-Coello* v. *INS*, 857 F.2d at 26. Such repeated cycles of administrative and judicial review would be freely available if petitioner's argument were sustained. Nothing in the statutory scheme justifies such a drastic departure from Congress's intent "to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti*, 375 U.S. at 224.

There is all the less reason to twist the language of Section 1105a to encompass petitioner's case because petitioner could seek a stay of deportation from the INS District Director, and, if that is denied, pursue a remedy in district court. In *Cheng Fan Kwok*, this Court indicated that, "In situations to which the provisions of [Section 1105a(a)] are inapplicable, the alien's remedies would, of

course, ordinarily lie first in an action brought in an appropriate district court." 392 U.S. at 210. See *Gando-Coello* v. *INS*, 857 F.2d at 26. In such an action, petitioner could attempt to persuade a district judge that his claim has sufficient merit to warrant restraining the INS from executing its lawful order of deportation during the pendency of his motion to reopen. Petitioner has chosen not to pursue that avenue. See Pet. 22-23. There is no reason, however, to make available to him the automatic stay provisions of Section 1105a when he is not seeking review of a final order of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No. A 26645216

UNITED STATES OF AMERICA:

IN THE MATTER OF

YUN KIL MOON, RESPONDENT

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act

DECISION OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is order that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before January 1, 1985 or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Korea on the charge(s) contained in the Order to Show Cause.

Copy of this decision has been served on respondent.
Appeal: Waived

Date: September 18, 1984

Place: Memphis, TN

/s/ CHARLES E. AUSLANDER, JR.
(Immigration Judge)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

File A 26 645 216

IN THE MATTER OF

YUN KIL MOON

In DEPORTATION Proceedings

ORDER OF THE IMMIGRATION JUDGE

THE RESPONDENT HAS ASKED THE COURT TO REOPEN DEPORTATION PROCEEDINGS AND ALLOW THE RESPONDENT TO ADJUST HIS STATUS TO THAT OF A LAWFUL PERMANENT RESIDENT. THE RESPONDENT IS NOW MARRIED TO AN AMERICAN CITIZEN.

THE IMMIGRATION & NATURALIZATION SERVICES OPPOSES ALL RELIEF FOR THE RESPONDENT AS THEY ALLEGE HE IS INELIGIBLE AND UNDESERVING OF ANY RELIEF.

THE RESPONDENT APPEARED AT HIS DEPORTATION HEARING ON 18 SEPTEMBER 1984, ADMITTED ALL THE ALLEGATIONS IN THE ORDER TO SHOW CAUSE AND CONCEDED DEPORTABILITY. HE ASKED FOR AND WAS GRANTED VOLUNTARY DEPARTURE ON OR BEFORE 1 JANUARY 1985.

ON 22 NOVEMBER 1984 THE RESPONDENT MARRIED AN AMERICAN CITIZEN. THE WIFE OF THE RESPONDENT FILED A VISA PETITION ON HIS

BEHALF AND IT HAS SUBSEQUENTLY BEEN APPROVED.

THE IMMIGRATION & NATURALIZATION SERVICE CONTENDS THE RESPONDENT'S INITIAL VISA (1982) WAS PROCURED BY FRAUD. FURTHERMORE, THE SERVICE CONTENDS THAT THE RESPONDENT DID NOT COME ON A VISIT BUT INTENDED TO IMMIGRATE WHEN HE ENTERED THE UNITED STATES IN 1982. THE SERVICE CONTENDS THAT ONCE THE RESPONDENT ENTERED THE U.S. HE MARRIED A U.S. CITIZEN IN ORDER TO PROCURE A VISA. IN SUPPORT OF THEIR CLAIMS THE SERVICE SUBMITS A SWORN STATEMENT FROM THE WIFE WHICH ADMITS THE MARRIAGE WAS FRAUDULENT. THE SERVICE FURTHER BUTTRESSES THE CLAIM BY SHOWING THAT THIS MARRIAGE WAS ANNULLED.

I CONCUR WITH THE SERVICE. I FIND THAT THE RESPONDENT DID ATTEMPT TO PROCURE A VISA BY FRAUD ON AT LEAST TWO OCCASIONS. THEREFORE, I FURTHER FIND THAT BECAUSE OF THE ACTS OF MISREPRESENTATION INVOLVED, HE IS INELIGIBLE TO ADJUST HIS STATUS AND AS A RESULT OF THE LESS THAN HONORABLE CONDUCT ON THE PART OF THE RESPONDENT, I WILL NOT GRANT HIM ANY DISCRETIONARY RELIEF.

ORDER: THE MOTION TO REOPEN IS DENIED. IF THE MOTION TO REOPEN HAD BEEN GRANTED THE MOTION TO ADJUST WOULD HAVE BEEN DENIED ON GROUNDS OF STATUTORY INELIGI-

BILITY AND AS A MATTER OF DISCRETION.

Date: 28 AUGUST 1987

Place: OAKDALE, LA

/s/ R. KEVIN MCHUGH
(Immigration Judge)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

File A 26 645 216

IN THE MATTER OF

YUN KIL MOON

In DEPORTATION Proceedings

ORDER OF THE IMMIGRATION JUDGE

The respondent petitioned the court on 10 May 1988, to reopen the proceedings.

The respondent avers that he is now lawfully married and now eligible for Suspension of Deportation. The respondent has filed affidavits of hardships concerning his eligibility for relief from deportation.

A previous motion to reopen was denied on 28 August 1987. Upon review of all the matters submitted by both parties, I do not find that circumstances are materially different from the circumstances on 28 August 1987. Accordingly, I adhere to my earlier decision in this matter.

ORDER: The Motion to Reopen is DENIED.

Date: 27 JUNE 1988

Place: OAKDALE, LA 71463

/s/ R. KEVIN MCHUGH
(Immigration Judge)

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